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Linda McCulloch  
Superintendent

September 6, 2005

Troy R. Justesen  
Deputy Assistant Secretary for OSERS  
U.S. Department of Education  
400 Maryland Avenue, SW  
Potomac Center Plaza Room 5126  
Washington, DC 20202-2641

Dear Dr. Justesen:

The Office of Public Instruction (OPI), Division of Special Education, appreciates this opportunity to submit comments in response to the Notice of Proposed Rulemaking (NPRM) for the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) that was published in the *Federal Register* on June 21, 2005.

Our comments are limited to those areas where we believe that the regulations are not clear or where we believe that the regulations either go beyond the federal statute or are inconsistent with the statute.

Our comments on specific sections of the regulations follow.

**300.18 Highly qualified special education teacher.**

**(d) Requirements for highly qualified special education teachers teaching multiple subjects.**

**Comment:**

The IDEA 2004 provides flexibility for special education teachers teaching multiple subjects. However, the law is silent for special education teachers teaching multiple levels. The extraordinarily high proportion of small rural schools in Montana often results in the same special education teacher serving students in multiple levels.

For the 2003-2004 school year, there were 273 elementary districts, 110 high school districts, and 56 K-12 districts in Montana. Using personnel data from the October 2003 Annual Data Collection (2003-2004 school year) there were 55 elementary districts that reported at least one special education teacher who was also reported by a high school district (same teacher). And, there were 24 K-12 districts that reported at least one special education teacher in both an elementary school and a high school (same teacher).

*"It is the mission of the Office of Public Instruction to improve teaching and learning through communication, collaboration, advocacy, and accountability to those we serve."*

In terms of percentages, 20.1 percent of elementary districts reported at least one special education teacher who was also reported by a high school district. And, conversely, 50 percent of high school districts reported at least one special education teacher who was also reported by an elementary district. And, 42.8 percent of K-12 districts reported at least one special education teacher at an elementary school and high school (same teacher).

Of the districts noted above, there were 23 elementary districts that reported only one special education teacher and that same teacher was reported as the only special education teacher by a high school district. And, 20 K-12 districts reported only one special education teacher who taught at both an elementary and high school.

In terms of percentages, 8.4 percent of elementary districts reported only one special education teacher where the same teacher was reported by a high school district as the only special education teacher. And, conversely, 20.9 percent of high school districts reported only one special education teacher where the same teacher was reported as the only teacher at an elementary district. And, 35.7 percent of K-12 districts reported only one special education teacher in the district who taught at both an elementary school and a high school.

The above data is an indication of the scope of the impact of the highly qualified special education teacher provision on Montana's schools. It is essential that the regulations address the issue of special education teachers teaching multiple levels. Failing to do so would come at great cost to our districts. Compliance with the regulations as written would likely require the districts to hire many new personnel exacerbating the personnel shortage.

**Recommendation:**

Subpart (d) of the proposed regulations should add a provision similar to the multi- subject special education teacher provision for teachers teaching multiple levels. Suggested language follows:

"Special education teachers who teach multiple subjects and who are highly qualified in mathematics, language arts, science, or elementary education are considered highly qualified provided they demonstrate competence through a multi-subject HOUSSE in the other core academic subjects in which the teacher teaches not later than two years after the date of employment or three years after the date of employment if teaching in a school that qualifies under the Small, Rural School Achievement Program (SRSA)."

**Rationale:**

Similar to the values underlying NCLB concerning the need for teachers to demonstrate competence in core academic subject matter, Montana special education teacher preparation standards have historically placed a premium on core academic subject knowledge. Consistent with Montana's Professional Educator Preparation Program Standards (PEPPS), all undergraduate programs preparing special education teachers require students to take the course work necessary to become a fully licensed general educator. Thus, every special education teacher trained in Montana has obtained a degree in either elementary education or secondary education. It is our position that special education teachers must have a solid background in core

academic subject matter in order to effectively meet the needs of students with disabilities. Montana believes that it is important to preserve our emphasis that special education teachers are knowledgeable in core academic areas.

For financial reasons, the realities of nationwide personnel shortages in special education, and the fundamental belief that our teachers are already prepared with knowledge in core academic subjects acquired by taking the course work necessary to become a fully licensed general educator, we seek this flexibility.

**300.18 Highly qualified special education teacher.**

**(e) Rule of construction.**

**Comment:**

Subpart (e) states in part "...nothing in this part shall be construed to create a right of action on behalf of an individual student or class of students for failure of a particular SEA or LEA employee to be highly qualified." The purpose of this provision is to ensure that teachers are protected from complaints related to the teacher's standing on the definition of being "highly qualified." However, the proposed regulation is silent in regard to actions of a state agency when meeting the state's responsibilities for general supervision under IDEA under this provision.

**Recommendation:**

Subpart (e) should be further clarified to state that when the SEA or LEA employs an individual who is not "highly qualified," states meet their responsibilities for general supervision under IDEA through the application of parent notice provisions of the Elementary and Secondary Education Act (ESEA).

**Rationale:**

Enforcement procedures under IDEA are triggered by findings of noncompliance whether the initial cause of the enforcement was a result of a complaint by a parent or as a result of a compliance-monitoring visit by the state. When Congress established the limitation on the right of action for failure of an LEA or SEA to employ a "highly qualified" teacher, Congress addressed the concern that individual teachers not become the target for a finding of noncompliance. Unless the regulations are expanded to clarify that state agency enforcement procedures under compliance monitoring are limited to NCLB enforcement procedures, the "highly qualified" credentials of an individual teacher may inappropriately become the target for a finding of noncompliance.

The ESEA contains specific procedures for failure of a district to comply with the highly qualified provisions. If state agencies also exercise sanctioning authority under the IDEA, schools could be twice punished, under two separate provisions of federal law, for the same infraction. To avoid double jeopardy, regulations need to be written that clarify that NCLB enforcement procedures for a district's failure to hire "highly qualified" teachers follow the provisions of NCLB and not IDEA.

## **Section 300.34 Related Services.**

### **(b) Exception.**

#### **Comment:**

We support the proposed language in subsection (b) of this section that clarifies that “related services do not include a medical device that is surgically implanted, the optimization of device functioning, maintenance of the device, or the replacement of that device” and urge that this language be retained in the final regulation.

## **Section 300.156 Personnel qualifications.**

### **(e) Rule of construction.**

#### **Comment:**

We noted in an above comment that Section 300.18 (e) expressly prohibits parents from filing a complaint if their child does not have a highly qualified teacher. However, subparagraph (e) of 300.156 specifically permits a parent to file a complaint with the state. We believe that without clarification, this would appear inconsistent with Congressional intent as articulated in the Conference Report, Comment 97, which states in part: “The House bill requires the State plan to include standards to ensure that all special education teachers are highly qualified in core academic subjects; ... and establishes that those requirements do not create a right to action.

#### **Recommendation:**

We strongly recommend that a clarification statement be added to the end of subparagraph (e)(2) stating that: "A parent's right to file a complaint concerning staff qualifications is limited to the issue of whether or not the LEA has taken measurable steps to recruit, hire, train, and retain highly qualified personnel."

We also recommend that an additional clarification statement be added to the end of subparagraph (d) stating: "The state has met its general supervisory responsibilities for highly qualified personnel by ensuring that the LEA has taken measurable steps to recruit, hire, train, and retain highly qualified personnel."

#### **Rationale:**

The IDEA 2004 is silent with regard to how a state should meet its general supervisory responsibility for ensuring that the provisions for “highly qualified” teacher standards are met. It is clear, however, that Congress intended that findings of noncompliance (whether the finding is a result of state monitoring or a result of the filing of a complaint by a parent) are not actionable. Congress would not have articulated the above-referenced commentary on the law and included the specific provisions in 20 USC 1401 (10)(E) and 20 USC 1412(a)(14) if it did not intend to protect teachers from becoming the cause of findings of noncompliance whether the source of the finding is a result of monitoring or is a result of the filing of a complaint by a parent.

When combined, these two clarifications will eliminate confusion for parents over exactly what they have a right to file a complaint on with regard to staff qualifications and will eliminate confusion for SEAs over their responsibilities for general supervision. These clarifications would also eliminate confusion and the potential for double jeopardy when the state enforces the

provisions of IDEA and NCLB. The IDEA enforcement procedures would apply for districts that fail to take measurable steps to recruit, hire, train, and retain highly qualified personnel. The NCLB enforcement procedures would apply to districts for the failure to hire "highly qualified" personnel.

**Section 300.205 Adjustment to local fiscal efforts in certain fiscal years.**

**(b) Use of amounts to carryout activities under ESEA.**

**Comment:**

We support the proposed language contained in subparagraph (b) which states that districts could reduce fiscal effort so long as they demonstrate expenditures on activities that could be supported with ESEA funds regardless of whether the district actually participates in the ESEA-funded program or programs.

We also support the comments on the proposed rule that further clarify that an LEA can demonstrate that it has met the requirements in subpart (b) by showing that it has expended, for elementary and secondary education, an increased amount of local funds equal to the reduction.

While we support the proposed regulation, as well as the OSEP comment regarding the proposed regulation, we have concerns regarding the requirement that districts must spend the same amount (aggregate amount) as the allowed reduction for activities that would be allowed under ESEA. Declining school enrollment across the state of Montana presents a major fiscal challenge for many Montana schools. Between the 1993-1994 school year and the 2004-2005 school year, Montana experienced a 10 percent decline in enrollment.

Declining school enrollment dramatically impacts a district's general fund budget and, therefore, the district's total expenditures for elementary and secondary education. It is not unusual that while a district's total expenditures for elementary and secondary education decline, the district's per pupil expenditures increase. Therefore, it is important that a clarification be provided in subpart (b) stating that in cases of declining school enrollment a district may show that it has expended, for elementary and secondary education, an increased amount of local funds or state funds equal to the reduction on a per pupil basis.

**Recommendation:**

Language should be added to the proposed regulation to make provision for districts with declining enrollments. Following is proposed language:

The LEAs which have declining enrollments may take the allowed reduction in maintenance of effort if they can demonstrate that they have expended an increase in local or state funds for ESEA allowed activities on an aggregate or per capita basis.

**Rationale:**

Maintenance of fiscal effort often poses its most significant challenge for districts with declining state and local revenue. More often than not, this decline in revenue is directly related to declines in enrollment. In cases of declining enrollment, a district may actually be increasing per pupil expenditures for elementary and secondary education even though total expenditures have

declined. A more equitable standard for calculation of maintenance of fiscal effort would be established if the provisions allowed for an adjustment for expenditures on a per pupil basis.

### **300.321 IEP team.**

#### **(e) IEP team attendance.**

#### **Comment:**

While language in subpart (e) is consistent with USC 1414 (d), regulations are needed to clarify that the application of this provision applies exclusively to members of the IEP team selected by the public agency as IEP team members. The language in subpart (e) could easily be misinterpreted to mean that a district must include on the IEP team any teacher whose area of the curriculum or related services is being modified or discussed. This creates an impossible situation for districts on at least two points.

First, it would be impossible for a district to anticipate in advance IEP team discussion on which class or classes might include an area of the curriculum or related services that might be modified or discussed. Strictly interpreted, this could mean that every child's teacher needs to be present at every IEP meeting. Second, the logistics surrounding scheduling attendance of teachers would create a case management challenge of epic proportions negating any of the benefits derived from the reduction in "paperwork" provisions of the Act.

#### **Recommendation:**

We strongly recommend that a clarification statement be added to the end of subpart (e) specifically stating that subpart (e) applies to attendance of the team members identified by the public agency under provisions of subpart (a).

#### **Rationale:**

Subpart (a) clearly establishes the responsibility of the public agency to determine the IEP team and states that in part "... not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment)..." shall be a member of the team. The language in the above recommendation would avoid confusion by making it clear that the public agency has satisfied the requirements of the regulations in meeting the provisions for IEP team composition under subpart (a) while the provisions of subpart (e) apply exclusively to members of the IEP team that had been selected by the public agency as IEP team members.

Without this clarification, we anticipate a great deal of confusion over who is required to be in attendance at an IEP meeting. If subpart (e) is misinterpreted to mean that any teacher whose area of curriculum or related services is being modified or discussed must be appointed to the IEP team: 1) scheduling will become next to impossible; 2) regular education classes will frequently be taught by substitute teachers; 3) parents could sometimes feel overwhelmed when participating in meetings that often include 10 or more school staff; 4) the content of the IEP may not include modifications to the curriculum out of fear that the right IEP team members were not there to discuss the modifications; and 5) the excusal provisions contained in subpart (e) would create an extraordinary imposition of paperwork for teachers and case managers.

### **300.641 Annual report of children served -- information required in the report.**

#### **Comment:**

Compliance with reporting requirements of 300.641 (d) specify the procedures for reporting disability conditions of students. Complying with this provision appears incompatible with provisions of 300.111(d) which states in part "... Nothing in the Act requires that children be classified by their disability...".

While 300.11(d) has been in both the Act and regulations for many years, recent data collection and reporting requirements, including those required under the state performance plan, add provision after provision that requires states to collect, analyze, and report outcomes data by disability category. Recent data collection and reporting requirements have further amplified the need that students be classified by their disability.

#### **Recommendation:**

Clarification should be added to the regulations to provide clear direction to states on how states can exercise the flexibility granted in 300.111(d) while still meeting annual reporting requirements in 300.641 and all other data collection and reporting requirements established by the Secretary.

#### **Rationale:**

It has become increasingly difficult to meet data collection, analysis, and reporting requirements without classifying children by their disability. Simultaneously, there is a growing recognition that eligibility for special education can be made through a process that determines if the child responds to scientific, research-based intervention as part of the evaluation. These two forces appear incompatible and clarification is needed.

Please contact me at [brunkel@mt.gov](mailto:brunkel@mt.gov) if you have questions regarding these comments.

Sincerely,

Bob Runkel, Administrator  
Division of Special Education